No. 88-347

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1988

ERIN ANDREW CONN,

Petitioner,

—v.—

JENNIFER ANN CONN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE INDIANA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a man claiming responsibility for a woman's pregnancy has a federal constitutional right that would support the issuance of a permanent injunction preventing the woman from having an abortion.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jennifer Conn submits this brief in opposition to the petition for certiorari filed by Erin Conn, which seeks review of the judgment entered by the Indiana Supreme Court in this action, *Conn v. Conn*, 526 N.E.2d 958 (Ind. 1988). Mr. Conn's petition fails to establish any of the factors that weigh in favor of review on a writ of certiorari: This Court's prior decisions are dispositive, the Indiana Supreme Court properly applied those decisions, and no conflict exists among state or federal appellate courts as to the proper disposition of this case. *See* Sup. Ct. R. 17.

COUNTERSTATEMENT OF JURISDICTION

Petitioner Erin Conn offers three grounds for this Court's jurisdiction under 28 U.S.C. § 1257(3) to review the judgment of the Indiana Supreme Court. First, Mr. Conn seeks to invoke

the jurisdiction of this Court based on "the fact that the validity of state statutes, as applied, have been called into question under the Constitution of the United States." Pet. at 2.[1] This is plainly incorrect. No state statute granting substantive rights is involved in this case. As the Indiana Supreme Court expressly found, "Indiana has no statute proscribing abortion in the first trimester, nor does it have a statute requiring spousal consent." App. at 18a. Mr. Conn therefore contends that the Indiana statutes that confer general equity jurisdiction upon the courts were in effect held unconstitutional as applied.

In fact, in holding that the injunction issued against respondent Jennifer Conn was unconstitutional, the Indiana Supreme Court invalidated an *exercise of authority* under Indiana Code § 33-4-2-3 (the statute granting state courts the authority to issue injunctions) and *not the validity of the statute itself*. An objection to an exercise of authority under a statute whose validity is not attacked cannot establish U.S. Supreme Court jurisdiction over a state court decision.[2]

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1 Citations to Mr. Conn's "Petition For a Writ of Certiorari To the Indiana Supreme Court" will be in the form "Pet. at _____." Citations to the appendix to that petition will be in the form "App. at _____." Citations to the record will be in the form "R. _____."

2 For example, in *Kulko v. California*, 436 U.S. 84, 90 n. 4 (1978), the Court stated: "Appellant did not argue below that this statute was unconstitutional, but instead argued that the Due Process Clause of the Fourteenth Amendment precluded the exercise of in personam jurisdiction over him. The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction." Similarly, the Indiana courts in this case did not question the validity of Ind. Code § 33-4-2-3, but rather decided whether the Constitution itself would permit a particular type of injunction. *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n. 4 (1980) (quoting *Phillips v. United States*, 312 U.S. 246, 252 (1941)) ("[A]n attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority . . ."); *Jett Bros. Distilling Co. v. City of Carrollton*, 252 U.S. 1, 6 (1920) ("[T]he mere objection to an exercise of authority under a statute, whose validity is not attacked cannot be made the basis of a writ of error from this court.").

Moreover, Mr. Conn failed to make this claim in "an explicit and timely" manner in the Indiana courts, as is required to establish this Court's jurisdiction. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n. 4 (1980) (quoting *Charleston Fed. Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185 (1945)). The first time Mr. Conn ever mentioned any of the state statutes upon which he seeks to invoke this Court's jurisdiction was in his petition for rehearing in the Indiana Supreme Court. This Court has held that raising a federal question for the first time in a petition for rehearing is insufficient to establish U.S. Supreme Court jurisdiction under § 1257.[3]

Second, Mr. Conn suggests as an additional ground for jurisdiction "the assertion by the Petitioner . . . of rights under the Fourteenth and Ninth Amendments of the Constitution." Pet. at 2. Mr. Conn's claim that the Constitution confers upon him the right to prevent Ms. Conn's abortion is entirely without merit and therefore fails to raise a substantial federal question. As discussed in more detail below, no state statute purports to give Mr. Conn this right. Further, Mr. Conn does not cite a single case—and Ms. Conn submits that none exists—that supports his claim that the Constitution gives him the right to force Ms. Conn to submit to what amounts to compulsory pregnancy and forced childbirth. *See infra* pp. 9-16. A mere allegation of a federal question does not establish jurisdiction in this Court. Where, as here, "such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy," no jurisdiction lies. *Equitable Life Ins. Soc. v. Brown*, 187 U.S. 308, 311 (1902); *see also Zucht v. King*, 260 U.S. 174, 176 (1922).

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3 *See Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256, 258-59 (1920) ("The only ground mentioned . . . upon which this writ could be sustained is conflict between specified sections of the [state] statutes . . . and the Federal Constitution. But this point came too late, being first advanced below on the motion for rehearing."); *see also Slagle v. Ohio*, 366 U.S. 259, 264 (1961); *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 629 (1960); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Wilson v. Cook*, 327 U.S. 474, 483 (1946).

Finally, Mr. Conn relies for jurisdiction on "the assertion of the respondent . . . of rights under the Fourteenth Amendment of the Constitution." Pet. at 2. Ms. Conn, like every woman in this country, clearly has a federal constitutional right to choose to have an abortion, and this Court has jurisdiction to consider issues involving that right. The Court, however, should decline to exercise jurisdiction. The Indiana Supreme Court properly applied dispositive U.S. Supreme Court precedent affirming Ms. Conn's constitutional rights. Moreover, this Court need not even consider Ms. Conn's constitutional rights unless it creates for a man an affirmative constitutional right to use the power of the government to interfere with a woman's private and constitutionally protected right to choose to have an abortion.

COUNTERSTATEMENT OF THE CASE

In the morning of June 17, 1988, Jennifer Conn filed a dissolution of marriage petition in the Shelby Circuit Court. That same afternoon, Erin Conn filed a petition for a temporary restraining order ("TRO") prohibiting Jennifer Conn from terminating her first trimester pregnancy. R. 246. The court, the Honorable Robert T. Thopy sitting *pro tempore*, issued the requested TRO that afternoon without notice to Ms. Conn and without the submission of any legal memorandum supporting the motion. R. 233. The court also issued an "Order to Show Cause," ordering Ms. Conn to appear at a hearing and "show cause, if any there be, why the Temporary Restraining Order restraining [Ms. Conn] from having an abortion should not be made a preliminary injunction." R. 234.

On June 23, 1988, Ms. Conn filed a "Motion to Dissolve Temporary Restraining Order and Motion For Immediate Ruling or, Alternatively, For Immediate Hearing," accompanied by a supporting memorandum. R. 192, 198 & 230. Ms. Conn argued that the TRO violated her constitutional right to choose to have an abortion, recognized in *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny, and that Mr. Conn's claim to a constitutional right to interfere with her decision to have an abortion

was meritless. On June 24, 1988, she filed a "Motion to Vacate Order To Show Cause," R. 148, and appeared, pursuant to the court's order, at the June 24, 1988 hearing. R. 7. At that hearing, the court denied Ms. Conn's motion to dissolve the TRO. R. 4. Over Ms. Conn's objections, the court held an evidentiary hearing on whether she should be preliminarily enjoined from having an abortion and ordered her to testify when called as a witness by Mr. Conn. R. 8.

Because Ms. Conn objected to the jurisdiction of the court, the constitutionality of the restraining order, and the judicial inquiry into her decision regarding her pregnancy, she testified only that she was pregnant and wanted an abortion. R. 9. She refused to reveal the private and intimate details of her decision at the hearing, which was held in open court with the press and the public in attendance. R. 73-74. Mr. Conn and his father testified, over Ms. Conn's objections, concerning highly personal matters including the couple's use of contraception and their sexual habits. R. 24-25, 27, 30.[4]

On June 27, 1988, Judge Thopy issued a preliminary injunction ordering Jennifer Conn not to terminate her pregnancy. R.

4 As is apparent from the Shelby Circuit Court's description of Mr. Conn's testimony, he was extremely upset that Ms. Conn wanted a divorce and he clearly wanted to continue their relationship.

> When told by Wife of her desire for a divorce Husband threatened suicide. He said he would take the biggest gun he could find and kill himself. During his upset, he cried and crawled on the floor on his hands and knees. Also, while Husband was riding in a car with Wife driving, he jumped back and forth several times between the front seat and back, and banged his head against the ceiling of the car.

App. at 23a. It is also clear that Mr. Conn initially was unhappy about the unplanned pregnancy:

> When told by Wife of the pregnancy, Husband denied, in a moment of anger, that he was the father.
>
> . . . .
>
> Wife's current pregnancy was unplanned. The parties were familiar with various techniques of contraception in April and May of 1988, and were employing one such technique at the time of conception.

Id. Mr. Conn testified further that, prior to seeking an injunction prohibiting the abortion, he never even told Ms. Conn that he did not want her to have the abortion. *Id.* at 24a.

85. The court certified the issue for an interlocutory appeal, finding that Ms. Conn "will suffer substantial injury if this order is erroneous and the determination that it is erroneous is withheld until after judgment." App. at 28a. Jennifer immediately appealed the decision to the Indiana Court of Appeals, and on July 12, 1988 that court unanimously reversed the trial court's injunction. App. at 13a.

On July 15, 1988, the Indiana Supreme Court granted transfer in the case and, by a vote of four to one, adopted the decision of the Indiana Court of Appeals as its own. App. at 1a. The Court, however, granted Mr. Conn's request to continue the injunction prohibiting Ms. Conn's abortion for an additional week. App. at 12a. Mr. Conn thereafter applied to Justice Stevens and then to Justice Rehnquist for stays of the Indiana appellate court orders. Both Justices denied the applications without opinion. *Conn v. Conn*, No. A88-55 (U.S. July 22, 1988) (letter from Clerk of the Court). On July 22, 1988, thirty-five days after initially enjoining Ms. Conn from terminating her pregnancy, the circuit court dissolved its injunction. App. at 30a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT'S PRIOR DECISIONS ARE DISPOSITIVE AND WERE PROPERLY APPLIED BY THE INDIANA SUPREME COURT

A. Every Woman Has A Constitutional Right To Decide Whether or Not To Terminate Her Pregnancy

As the Indiana Supreme Court properly held, "[d]ispositive of this case are the decisions of the Supreme Court of the United States in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*." App. at 14a (citations omitted).

The United States Constitution guarantees every woman the fundamental right to decide, free from government intrusion, whether to end her pregnancy. The U.S. Supreme Court first clearly recognized this right to choose abortion in 1973, *see Roe*

v. Wade, 410 U.S. 113 (1973), and has since consistently and unequivocally reaffirmed the right in numerous decisions, *see, e.g., City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).[5] Most recently, the Court held that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 773 (1986).

In 1976 this Court decided the precise issue presented here; the Court rejected the claim that the state may deprive a woman of her constitutional right to choose to have an abortion in order to promote the interests and wishes of her husband. *See Danforth*, 428 U.S. 52. The Missouri law at issue in *Danforth* prohibited a married woman from having an abortion without her husband's consent. The Court struck down that law and made clear that a woman's right to end an unwanted pregnancy may not be infringed on the basis of her husband's objections. *Id.* at 69-71.

Mr. Conn argues that *Danforth* is not dispositive because it involved a state statute giving all men the right to veto their wives' abortion decisions, whereas Mr. Conn was seeking "judicial consideration of competing constitutional rights and interests on a case by case basis." Pet. at 12. This suggested distinction is insignificant. As the Court recognized in *Danforth*, "The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail." 428 U.S. at 71. Mr. Conn quite definitely seeks the creation of a right that would allow a man to use the

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5 *Roe v. Wade* and its progeny make clear that a state is barred not only from depriving a woman of her right to decide whether to have an abortion, but also may not interfere with her decisionmaking process. For example, the Court has held unconstitutional statutes that forced women to wait a specified period of time before obtaining an abortion, *Akron*, 462 U.S. at 450-51, that required abortions to be performed in hospitals, *id.* at 431-33, and that imposed biased or "lengthy and inflexible" informed consent requirements, *Thornburgh*, 476 U.S. at 759-63; *Akron*, 462 U.S. at 442.

courts to veto a woman's decision to have an abortion. Whether imposed by court order on a case-by-case basis or by state statute, the deprivation of a woman's constitutional right is equally complete and the harm resulting from a court-ordered pregnancy and childbirth equally devastating.

Moreover, this Court has already done the balancing of interests sought by Mr. Conn. The Court in *Danforth* expressly considered "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying." 428 U.S. at 69. Nevertheless, the Court concluded that a woman's right to make the abortion decision outweighs her husband's interests in each and every case: "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, *the balance weighs in her favor.*" *Id.* at 71 (emphasis added).

Roe and its progeny make clear that a case-by-case judicial inquiry into a woman's abortion decision would itself be unconstitutional. *Cf. Thornburgh*, 476 U.S. at 766 (quoting *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring)) ("It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."); *Doe v. Bolton*, 410 U.S. 179, 195-98 (1973) (abortion decision may not be subject to ad hoc determinations of hospital committee). An individual woman's personal circumstances are legally irrelevant. Recognizing the unparalleled importance of a woman's right to control her reproductive capabilities, the Court has declared that every adult woman has the right to decide to have an abortion and effectuate that decision without government interference, regardless of her very personal reasons and without having to reveal those reasons.[6]

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6 Faced with having to explain to a court their reasons for choosing abortion and having to expose intimate details of their lives to judicial and public scrutiny, some women would instead resort to unsafe, ille-

(*footnote continued*)

B. The Indiana Supreme Court Did Not Deprive Mr. Conn Of Any Federal Right

1. A Man Does Not Have A Constitutional Right To Interfere With A Woman's Decision To Have An Abortion

As explained above, the Court in *Danforth* considered the interests that a woman's husband may possess in the outcome of her pregnancy and concluded that those interests cannot justify depriving the woman of her abortion right. Thus, the Court implicitly rejected Mr. Conn's claim that he possesses constitutional rights that outweigh Ms. Conn's abortion right. *Dan-*

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gal abortions, despite the great risks to their health and lives. Although a private abortion is a legal and constitutionally protected choice, some women nevertheless have illegal abortions. A study of seventeen deaths following illegal abortions reported in the United States between 1975 and 1979 revealed that "[a] desire for secrecy was the primary reason four women sought illegal abortions and was a secondary factor for five others." Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Family Planning Perspectives 163, 165 (May/June 1982). Given that nine of seventeen women lost their lives due to a desire to keep their abortions secret during a time when their privacy was protected, that number inevitably would be far greater if Mr. Conn's "case-by-case" review were lawful.

Moreover, the purely voluntary role that men play in women's abortion decisions would likely be hurt under Mr. Conn's approach. Mr. Conn testified that Ms. Conn discussed with him the fact that she was pregnant. R. 24. The vast majority of women who have abortions inform the man involved. Plutzer & Ryan, *Notifying Husbands About An Abortion: An Empirical Look at Constitutional and Policy Dilemmas*, 71 Sociology and Social Research 183 (Apr. 1987). A study of 2,337 women seeking abortions at a clinic in St. Louis, Missouri revealed that 89.5% of the women had told the man involved about the pregnancy, and 92.8% of the married women had told their husbands. *Id.* at 185. If, however, a man had the right to seek a court order prohibiting a woman from obtaining an abortion, a woman considering abortion would be discouraged from choosing to consult with the man involved. The result could be far fewer men having any opportunity at all to influence women's abortion decisions and far less communication among couples.

forth is therefore dispositive of Mr. Conn's constitutional claims.

Even absent *Danforth* and the Court's other dispositive abortion cases Mr. Conn could not prevail. His assertion that Ms. Conn's abortion decision implicates his constitutional rights is frivolous. The federal constitutional rights cited by Mr. Conn—the right to procreate, rights derived from a marital relationship, and the right to raise one's children—protect a person only from *governmental* action.[7] Every case cited by Mr. Conn as support for his constitutional claims involves government action affirmatively interfering with the autonomy of private individuals.[8] This is not such a case.

For example, the Constitution certainly protects Mr. Conn's right to be free from government intrusion into his decision to have a child. But it is up to Mr. Conn, not lower court judges, to find a woman who will have a child with him. No individual,

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7 "The first section of the 14th Amendment, which is the one relied on, after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory upon the States. . . . It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment." *Civil Rights Cases*, 109 U.S. 3, 9-12 (1883); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982).

8 *See Rivera v. Minnich*, 107 S. Ct. 3001 (1987) (*state* may use preponderance of evidence standard in paternity proceeding); *Lehr v. Robertson*, 463 U.S. 248 (1983) (*state* not required to provide hearing before severing parental rights of absentee parents); *Santosky v. Kramer*, 455 U.S. 745 (1982) (*state* may not sever parental rights absent clear and convincing evidence of unfitness); *Caban v. Mohammed*, 441 U.S. 380 (1979) (*state* may not practice sex discrimination in adjudicating parental unfitness); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (*state* not required to provide veto over adoption to unwed, absentee father); *Stanley v. Illinois*, 405 U.S. 645 (1972) (*state* may not sever parental rights based on unmarried status); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (*state* may not prohibit sale of contraceptives to married individuals); *Prince v. Massachusetts*, 321 U.S. 158 (1943) (*state* may restrict public sale of merchandise by minors, including sale of religious publications); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (*state* may not sterilize persons convicted of crimes); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (*state* may not forbid teaching of foreign languages in private schools).

male or female, has a constitutional right to have a court compel another to procreate with him or her. To the contrary, the Constitution guarantees that the government will not interfere with the reproductive choices made by any individual.

Justice Stevens recently noted this fundamental flaw in Mr. Conn's claim when he denied an application for an injunction in a legally and factually similar case, *Doe v. Smith*, 108 S. Ct. 2136 (1988). In refusing to grant the injunction, Justice Stevens wrote "I have serious doubts concerning the availability of a federal remedy for this claim in view of the fact that Jane Smith's decision to obtain an abortion can be carried out without any action on the part of the State of Indiana or any other state governmental subdivision." *Id.* at 2137.

The constitutional rights asserted by Mr. Conn act only as "a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens." *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128, 132 (1974). The court in *Doe* rejected a request by a man to enjoin his wife's abortion, concluding "[w]e find no basis for the husband's assertion that the Constitution enables him to summon the Commonwealth to help him in a dispute with his wife." *Id.* Mr. Conn improperly seeks to twist constitutional shields designed to protect individuals from government intrusion, into swords of government coercion to subordinate women to the wills of their husbands.[9]

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9 Mr. Conn contends that he has a constitutional right under the due process and equal protection clauses of the Fourteenth Amendment to a judicial consideration of his constitutional claims. *See* Pet. at 28-30. Because no state action is involved, Mr. Conn has no substantive constitutional right that is implicated by Ms. Conn's private decision to have an abortion. Mr. Conn therefore is not entitled under the due process clause to a hearing regarding Ms. Conn's abortion decision. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *see also Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

(*footnote continued*)

a. Right to Procreate

The implications of Mr. Conn's distortion of the right to procreate are staggering: In effect he claims that the right to procreate entitles a man to invoke the power of the government to compel a woman to bear his child. If he is correct, courts could order unwilling individuals to engage in uncontracepted sex with spouses or lovers desirous of having children. Or, an individual whose sexual partner did not wish to have a child could be compelled to use contraception during sex. The Supreme Judicial Court of Massachusetts outlined the insidious implications of judicial intervention in refusing to issue an injunction similar to the one requested by Mr. Conn:

> [W]e would not order either a husband or a wife to do what is necessary to conceive a child or to prevent contraception, any more than we would order either party to do what is necessary to make the other happy. We think the same considerations prevent us from forbidding the wife to do what is necessary to bring about or prevent birth . . . . Some things must be left to private agreement.

Doe v. Doe, 365 Mass. 556, 314 N.E.2d 128, 132 (1974).

Given the constitutional right not to procreate, a man who did not want a child would even have the right to seek a court order forcing a woman to submit to an unwanted abortion:

Mr. Conn's equal protection claim is equally without merit. "The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances." *Frost v. Corporation Comm'n*, 278 U.S. 515, 522 (1928). Mr. Conn is *not* arguing that the same rule of law is being inequitably applied to him. Instead, he argues that he is being denied equal protection because he could be required by state statute to "provide the basic support needed for the survival" of a child of his marriage. Requiring parents to support their children financially is in no way comparable to forcing a woman to bear an unwanted child. Pet. at 29. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Norvell v. Illinois*, 373 U.S. 420, 423-24 (1963).

> If we were to conclude that a putative father has the standing to *prevent* the natural mother from terminating the pregnancy would the putative father have the corresponding standing to *compel* the termination of the pregnancy . . . ? Could a potential putative father (or for that matter a husband) seek an injunction to restrain the woman from using contraceptives or compel the woman to bear children? Such circumstances would seem ludicrous . . . and it would be beyond the province of logic and reason to suggest that she could be compelled to procreate.

Jones v. Smith, 278 So.2d 339, 344 (Fla. App. 1973) (emphasis in original) (court refused to enjoin woman from having abortion opposed by man claiming responsibility for pregnancy, despite man's expressed desire to marry woman and assume responsibility for child), *cert. denied*, 415 U.S. 958 (1974).[10]

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10 Courts exercising equitable jurisdiction have historically been reluctant to compel the performance of personal services, particularly in the intimately private realm of family life and childbearing. Numerous cases have concluded that courts sitting in equity simply cannot compel performance of the most personal and intimate services without violating fundamental principles of privacy that restrain court intrusiveness. *E.g.*, *Janney v. Housekeeper*, 70 Md. 162, 16 A. 382 (1889) (husband cannot obtain injunction against wife's mastectomy); *In re Clark*, 1 Blackf. 136, 136-38 (Ind. 1821) (enforcement of personal service contract "would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery").

A New Jersey court has aptly described the fundamental impropriety of granting the equitable relief sought by Mr. Conn:

> Plaintiff . . . [sought] an injunction against the planned abortion. The only possible way that the court could enforce such an injunction would be to confine. The alternative is merely to threaten a civil penalty for contempt if the abortion proceeds nonetheless. Assuming there were such a violation of this court's order by a young lady who is in school, who is four to six weeks pregnant, with or without medical testimony of her psychiatric condition, what are the alternatives open to the court? Fine her? Impose a jail sentence? The court will neither devise a penalty nor place a monetary value on either a woman's right to terminate pregnancy or on the potentiality of the four to six-week-old fetus. The court sees no

(*footnote continued*)

If Mr. Conn's analysis were accepted the federal courts would be called upon to resolve countless disputes involving abortion, sterilization, and the use of birth control, between spouses and lovers unable to agree about whether to have a child.

b. Rights Derived From Marriage

Mr. Conn asserts that "the fact of his marriage" to Ms. Conn confers upon him "additional constitutional protection." Pet. at 20. Mr. Conn does not discuss in detail the nature of these additional constitutional rights, but he does refer to a "marital privacy right." Mr. Conn seems to be arguing that the privacy right inheres in the marital couple, rather than in the husband and wife as individuals. This view was rejected in *Danforth* and also runs counter to the basic principle that the privacy right protects individuals only from *government* action. Moreover, in *Eisenstadt v. Baird*, this Court expressly rejected the notion that the marital couple is a separate independent entity, and instead recognized marriage as "an association of two individuals each with separate intellectual and emotional makeup." 405 U.S. 438, 453 (1972) (unmarried individuals have constitutional right to use contraceptives). The Court stated that "it is the right of the *individual*, married or single" to decide, "free from unwarranted government intrusion," whether or not to have a child. *Id.* (emphasis in original); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977) ("*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.").

Mr. Conn's assertion of rights "inherent in his status as a husband," pet. at 20-21, amounts to a claim that a man has the

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possible way, from a practical viewpoint, of enforcing such an injunction even if the law arguably justified the injunctive relief sought.

Rothenberger v. Doe, 374 A.2d 57, 59 (N.J. Super. 1977).

right to use the power of the state to subjugate his wife's will to his own. This outdated view of the marital relationship is inconsistent with this Court's condemnation of our country's "long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). Since 1973, the Supreme Court has recognized that unimpeded access to safe legal abortion services is essential to women's capacity to live as free, equal and autonomous citizens. *See Roe*, 410 U.S. 113. Most recently, the Court reiterated this principle in *Thornburgh*:

> Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond reach of government . . . . *That promise extends to women as well as to men*. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty *that our law guarantees equally to all.*

476 U.S. at 772 (citations omitted; emphasis added). Stripping women of control of their reproductive capacity, and giving that control to their husbands, would condemn women to a continued existence as unequal and subordinate members of our society.

c. Right to Raise One's Children

Mr. Conn's reliance on the constitutional right of fathers to "the care, custody, companionship, and control of their children," pet. at 17, is entirely irrelevant to Ms. Conn's decision to have an abortion. Certainly, fathers as well as mothers have constitutional rights (again, assertable only against government action) vis-a-vis their children. Yet those rights are not in any way implicated here because this case involves neither a child nor a father. Rather, the issue here is whether a man can force a

woman to bear a child and become a mother against her wishes in order to satisfy his desire to have a child.

The theoretical basis for Mr. Conn's asserted interests directly conflicts with settled case law. Mr. Conn's alleged "paternal rights" are ultimately based on a theory that human life begins at conception, so that a fetus is a "child" and a man who has fertilized a woman's ovum is a "father." Yet the Court in *Roe* rejected precisely this effort to enshrine a particular theory of life as state law. *See Roe v. Wade*, 410 U.S. at 159-62; *see also Akron*, 462 U.S. at 444 ("a State may not adopt one theory of when life begins to justify its regulation of abortions"). The state of Indiana has not adopted as law Mr. Conn's theory of when life begins, but even if it had, such a law would plainly be unconstitutional and thus unable to support Mr. Conn's claims.

II. THE INDIANA SUPREME COURT'S DECISION CONFORMS WITH THE DECISIONS OF EVERY APPELLATE COURT TO CONSIDER THE ISSUE

Every appellate court to consider the issue has held that a man does not have the right to a court order enjoining a woman from exercising her abortion right. This has been true in cases where the man seeking the court order was the woman's husband, *Lewis v. Lewis*, No. 111440 (Mich. Ct. App. Sept. 15, 1988), *appeal denied*, No. 841469 (Ind. Sept. 22, 1988), *application for stay denied mem.*, Nos. A-240, A-244 (U.S. Sept. 26, 1988); *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115 (1984); *Doe v. Doe*, 365 Mass. 566, 314 N.E.2d 128 (1974), as well as where the man was not the woman's husband but claimed to be responsible for the woman's pregnancy, *Doe v. Smith*, 527 N.E. 2d 177 (Ind. 1988), *applications for stay denied*, 108 S. Ct. 2136 (1988) (Stevens, J., in chambers), No. A-88-55 (U.S. July 22, 1988) (White, J.) (letter from Clerk of the Court); *Jones v. Smith*, 278 So.2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974). *See also Przybyla v. Przybyla*, 87 Wis.2d 441, 275 N.W.2d 112 (Wis. Ct. App. 1978) (woman's exercise of right to terminate her pregnancy without consent of husband cannot support recovery by husband for intentional infliction of emotional distress). Courts consistently

denied such requests even prior to *Danforth*: "[*Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973)] make crystalline . . . that a woman in the first trimester of pregnancy, in consultation with her physician, may elect to terminate the pregnancy, and neither the state nor the woman's spouse nor the father of the child has any right to intervene so as to prevent her decision from becoming fact." *Coleman*, 471 A.2d at 1119; *see also Doe*, 314 N.E.2d 128; *Jones*, 278 So. 2d 339. These cases were correctly decided and there is no reason to disturb this clear and unbroken precedent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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